IN THE

Supreme Court Of The United States

OCTOBER TERM, 1978

NO. 78-723

Guy Hamilton Jones, Sr. ..... *Petitioner*

V.

United States of America ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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The Petitioner Guy Hamilton Jones, Sr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding August 4, 1978.

OPINION BELOW

The opinion of the Court of Appeals, reported as _____ F.2d _____, appears in the Appendix hereto. The ruling by Judge Harris for the Federal

Court of the Eastern District of Arkansas is not reported but is also in the Appendix herein.

JURISDICTION

The judgment of the Court on Appeals for the Eighth Circuit was rendered on August 4, 1978. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1), and under Rule 19, Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

I. Whether the Decision Below Is In Conflict With Applicable Decisions of This Court For a Hearing Under 28 U.S.C. Sec. 2255 In Regard To Matters Happening Outside of the Record .....

II. Whether the Decision Below Is Based On a Conflict With Decisions of this Court Relative to a Lack of Appeal in a Motion Under 28 U.S.C. Sec. 2255 and Most Clearly Under Suspension of Imposition of Sentence .....

III. Whether the Decision Below Is In Conflict With a Decision of This Court on the Right of a Defendant to a Speedy Trial.....

STATEMENT OF THE CASE

This petition is presented because of the denial of a hearing on petitioner's motion to vacate in a criminal case under 28 U.S.C. §2255.

Petitioner was found guilty upon four counts of violation of federal income tax laws in the Federal Court of the Western Division, Eastern District of Arkansas, upon a second trial.

The first trial began July 10, 1972, and ended on July 18, 1972, with a sua sponte motion of mistrial by the presiding judge, the Hon. J. Smith Henley. This occurred after an in-chambers hearing near the end of the trial when the presiding judge was informed about the out-of-court acts of government attorneys and agents in contacting a trial juror for five days preceding.

Federal Judge Richard A. Dier of Nebraska, presided at the second trial of this cause which began on November 27, 1972. On December 4, 1972 Judge Dier summarily overruled petitioner's motion in double jeopardy.

During the course of the second trial, on December 7, 1972, Judge Dier suffered a fatal heart attack, and by agreement of the parties Federal Judge Oren Harris of Arkansas, presided over the trial through its conclusion the following day, on December 8, 1972.

Guilty verdicts were returned against the petitioner on each of the four counts and on April 3, 1973, Judge Harris fined the petitioner the sum of $5000 on count one, and suspended imposition of sentence on each of the four counts, placing petitioner on probation for a term of three years.

On March 26, 1976, petitioner timely filed his motion to vacate in this cause, pursuant to 28 U.S.C. §2255, seeking a hearing.

November 4, 1977 Judge Harris, District Judge, denied the petitioner a hearing on his motion.

By timely appeal, petitioner presented his petition for a hearing on his motion to the Eighth Circuit Court of Appeals.

On August 4, 1978, petitioner was refused his request for a hearing on his motion by the Eighth Circuit Court.

This petition is presented before this Court because the Eighth Circuit Court of Appeals ignored and refused to consider relevant, pertinent and controlling decisions of this Court, which were relied upon by petitioner.

INTRODUCTION

Petitioner has only been seeking and only seeks his "day in court" in a hearing on a 28 U.S.C. 2255 motion to vacate his conviction in a federal court.

Petitioner has endeavored to confine his pleadings and arguments to his right to a hearing rather than to produce the law or argument on issues which would inevitably arise from the hearing itself.

However, in many instances, the law and circumstances which tend to prove the "right to a hearing" are inextricably bound to the legal issues of the hearing itself, so petitioner has had to proceed accordingly.

In an effort to insure justice, all that the petitioner has done and can do, is to present the decisions of this Court which, under all the facts and circumstances, govern and control in his request for a hearing. Petitioner cannot understand why the rulings and decisions of this Court have been ignored in the Court below and a decision in conflict with applicable decisions of this Court have been entered.

REASONS FOR GRANTING WRIT

I. The Decision Below Is In Conflict With Applicable Decisions Of This Court For a Hearing Under 28 U.S.C. Sec. 2255 in Regard to Matters Happening Outside of the Record.

All of the matters and events complained of by petitioner occurred outside of the formal trial proceedings, outside the province of the trial judge and outside of his knowledge or consent. As far as the records of the trial itself, that is, the first trial of petitioner, nothing is available; matters of proof were secured in a civil trial by petitioner against government attorneys and agents.

Petitioner on this point relied on *Machibroda v. United States*, 368 U.S. 487, 7 L. Ed.2d 473, 82 S. Ct. 510 (1962) and on *Fontaine v. United States*, 411 U.S. 213, 36 L. Ed.2d 169, 93 S. Ct. 1461 (1973), affirming *Machibroda.*

In *Machibroda* this Court said: "The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the Government's response, related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the circumstances alleged of a kind the District Judge could completely resolve by drawing upon his own personal

knowledge or recollection". (The District Judge ruling upon petitioner's motion did not preside at the first trial which is the one complained of).

The mandate of this Court is clear. No effort has been made to distinguish *Machibroda* and *Fontaine* from the instant case. These decisions of this Court have simply been ignored.

II. The Decision Below Is Based On A Conflict With Decisions Of This Court Relative To a Lack of Appeal In a Motion Under 28 U.S.C. Sec. 2255, and Most Clearly Under Suspension of Imposition of Sentence.

Much of the decision in the Court below was based on the fact the petitioner did not appeal his conviction and sentence. This Court, in *Kaufman v. United States*, 394 U.S. 217, 22 L. Ed. 227, 89 S. Ct. 1068, (1969) stated as the law: "Later, in *Townsend v. Sain*, 372 U.S. 293, 311-312, 9 L. Ed.2d 770, 784, 785, 83 S. Ct. 745 (1963), we pointed out the vital distinction between the appellate and habeas functions and concluded that habeas relief cannot be denied solely on the ground that relief should have been sought by appeal to prisoners alleging constitutional deprivations: 'The whole history of the writ—its unique development—refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review. The function of habeas is different. It is to test by way of an original civil proceeding,

independent of the normal channels of review of criminal judgments, the very gravest allegation ... The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary.' "

The records reflect that the Eighth Circuit in at least two cases involving a §2255 motion, has ruled that the motion was being used as a substitute for an appeal, rather than denying it outright, and this since *Kaufman* (1969).

In its decision below the Eighth Circuit stated: "Jones has provided no explanation as to why he did not pursue the appeal procedure." Despite this statement by the lower Court petitioner had relied in his brief on a decision by this Court in *Andrews v. United States*, 373 U.S. 334, 10 L. Ed.2d 383, 83 S. Ct. 1236 (1963).

The record reflects that petitioner was fined $5,000 on count one of four counts and that suspension of imposition of sentence was adjudged on all four counts. The state of the record in the Court below brought this case under the mandate of this Court in *Andrews*, in which this Court said: "The long-established rules against piecemeal appeals in federal cases and the overriding policy consideration upon which that rule is founded have been repeatedly emphasized by this Court. (Citing cases). The standards of finality to which the Court has adhered in habeas corpus proceedings have been no less exacting. See, e. g. *Collins v. Miller*, 252 U.S. 364, 64 L. Ed. 616, 40 S. Ct. 347. There the court

said that the rule as to finality 'requires that the judgment to be appealable should be final not only as to all the parties but as to the whole subject-matter and as to all the causes of action involved.' 252 U.S. at 370"

The decision in the Court below is in conflict with this decision of this Court, in so far as the lack of an appeal on the part of the petitioner is considered. Under *Andrews* the petitioner was precluded from an appeal.

III. The Decision Below Is In Conflict With a Decision of This Court on The Right of a Defendant To a Speedy Trial.

One of the most far reaching decisions of this Court in an effort to insure justice and to protect the constitutional rights of a defendant in a criminal trial is found in *United States v. Dinitz*, 424 U.S. 600, 47 L. Ed.2d 267, 96 S. Ct. 1075 (1976). As a hand fits a glove, *Dinitz* applies to the petitioner's allegations. Petitioner relied on *Dinitz* in the Court below and *Dinitz* was ignored below and the rule was in conflict with an applicable decision of this Court.

In *Dinitz* the respondent moved to dismiss the indictment on the ground that a retrial would violate the Double Jeopardy Clause of the Constitution. In *Dinitz* this Court also ruled on the defendant's "valued right to have his trial completed by a particular tribunal." And in this case this Court said: "The Double Jeopardy Clause does protect a defendant against governmental actions

intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad-faith conduct by judge or prosecutor,' *United States v. Jorn*, supra, at 485, 27 L. Ed. 543, 91 S. Ct. 547 threatens the 'harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant." (Citing cases)

CONCLUSION

For the reasons herein stated, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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